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IN THE

Supreme Court of the United States

October Term, 1963.

No. 284

A. M. BYERS COMPANY,

Petitioner,

v.

HOWARD JAMISON, Administrator of the Estate of ALBERT TUCKER, Deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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HOWARD JAMISON, ADMINISTRATOR OF THE ESTATE OF ALBERT TUCKER, DECEASED.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

A. M. Byers Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on April 8, 1964.

OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Pennsylvania (R. 186a-197a) [1] is reported at 222 F. Supp. 475 (1962). The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-9a) is reported at 330 F. 2d 657 (1964).

1. Record references here are to Byers' Appendix in the court below.

JURISDICTION.

The Judgment of the Court of Appeals (App. A, *infra*, p. 9a) was entered on April 8, 1964, and a timely petition for rehearing was denied by order dated May 20, 1964 (App. B, *infra*, p. 10a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

In a diversity case arising out of the injury in Pennsylvania of an employe of an independent contractor while shoring a sewer trench, when the employer of the independent contractor has exercised no control whatever over the independent contractor's work, may a Court of Appeals permit a verdict against the employer to stand on the authority of Section 414 of the Restatement of the Law of Torts and certain federal cases which refer to principles announced in that section, totally ignoring controlling decisions of the Supreme Court of Pennsylvania which are diametrically opposed to the suggested rule in the Restatement?

STATUTES AND CONTRACT PROVISIONS INVOLVED.

1. The Rules of Decision Act (Act of June 25, 1948, 62 Stat. 944, 28 U. S. C. § 1652) provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

2. Relevant provisions of the construction contract involved here (R. 155a-173a) are set forth at appropriate places in the body of this petition.

STATEMENT.

Plaintiff is the administrator of Albert Tucker, a carpenter's helper who was killed in Pittsburgh, Pennsylvania on February 3, 1959, while he and a co-worker were shoring a sewer trench in the course of their employment for Allegheny Contracting Industries, Inc. (R. 6a), a Pittsburgh firm experienced in excavation (R. 102a). The death resulted from a cave-in caused by the collapse of the shoring which Tucker and his co-worker were installing, allegedly due to the fact that the planks used for the shoring, which were supplied by Allegheny, were too short and the bracing was too small (R. 92a-98a, 177a).

Allegheny had contracted with A. M. Byers Company, "* * * to furnish all labor, material, supplies, equipment * * * and other facilities * * * and to perform all work necessary or incidental to * * *" the construction of a sanitary sewer which Byers was required by a public authority to install at its plant (R. 155a).

The contract between Allegheny and Byers provided (R. 166a, 169a) that Allegheny should "do all bracing, sheathing, and shoring necessary to * * * protect all excavations" and was absolutely responsible "* * * for the condition of all excavations * * *". Although Byers reserved rights to inspect (R. 168a), to stop the work (R. 160a), and to give directions for shoring (R. 163a-169a), the contract provided (R. 166a-167a) that "the neglect, failure or refusal of * * * Byers to give directions relative to shoring * * * shall not in any way or to any extent relieve the contractor of any responsibility concerning the condition of excavations * * *"; and Byers did not in fact give any directions or exercise any control whatever (App. A, *infra*, p. 6a).

Judge Willson of the United States District Court for the Western District of Pennsylvania submitted the case to the jury solely on the basis of Section 414 of the Re-

statement of Torts, which the Judge stated to be the law of Pennsylvania (R. 129a-130a, 187a). Section 414 provides:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for bodily harm to others, for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

The jury returned a verdict against the defendant-petitioner.

Petitioner urged in the District Court and in the Court of Appeals that it was entitled to judgment n.o.v. because Section 414 of the Restatement of Torts is **not** the law of Pennsylvania and is completely contrary to the relevant decisions of the Supreme Court of Pennsylvania.

The Court of Appeals affirmed the District Court's refusal to enter judgment n.o.v. It conceded that Pennsylvania law governs the case but erroneously made the statement that (App. A, *infra*, p. 5a): "Defendant has not cited Pennsylvania cases to refute the Restatement view.", and completely ignored the cases which had been cited in petitioner's brief.

A reproduction of page 16 of the "Brief for Appellant" is appended (App. C, *infra*, p. 11a) as are also reproductions of pages 4 and 5 of the "Petition of Appellant for Rehearing" in the Court below (App. D, *infra*, pp. 12a-13a).

Examination of these pages will demonstrate that three Pennsylvania cases,—**City of Erie v. Caulkins**, 85 Pa. 247 (1877); **Pennsylvania Railroad Company v. Allegheny County**, 324 Pa. 216 (1936); and **Townsend v. Pittsburgh**, 383 Pa. 453 (1956),—were cited both in the Brief for Appellant in the Court of Appeals and in the Petition for Rehearing. These three cases hold clearly that where an owner or contractor employs an independent contractor to do work and reserves only a general right to control the

work, which is not the equivalent of a master's right to control a servant, liability for the negligence of the independent contractor's employes is the sole responsibility of the independent contractor, unless the owner or contractor in fact exercises some control over the work.

That was the issue in the present case.

The three Pennsylvania cases have not been overruled.

The Court of Appeals chose to rely on the section of the Restatement of Torts which we have quoted and upon dicta in a number of its own decisions which would be, if sustained, federal common law at variance with the common law of Pennsylvania.

The Court below referred to certain Pennsylvania cases but, in each case thus mentioned, the contractor had in fact exercised some degree of control over the work. That feature clearly distinguishes them from the three controlling Pennsylvania decisions cited by the petitioner.

REASON FOR GRANTING THIS WRIT.

Unless **Erie R. Co. v. Tompkins**, 304 U. S. 64 (1938) is to become a dead letter, Courts of Appeals must in diversity cases follow and apply state law.

This case involved the construction of a Pennsylvania contract. In such circumstances, the Court below was not free to overlook Pennsylvania decisions and instead to base its decision on a section of the Restatement of the Law of Torts which has not been accepted by the Pennsylvania courts, or, as far as we have been able to learn, by the courts of any other state.

Unless a writ of certiorari is granted and the decision below reversed, petitioner will have sustained real injustice in having been subjected to a liability which, in any Pennsylvania court, would not have been imposed. And this injustice points to the broad importance of the question presented. The employment of independent contractors

under contracts similar to that here involved is an every day matter in Pennsylvania, as in most states. The relationship under such contracts should not be permitted to become the subject of conflicting interpretations, depending solely on the choice of forum.

CONCLUSION.

For the reasons set forth above, this petition for certiorari should be granted.

Respectfully submitted,

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July, 1964

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,262

HOWARD JAMISON, Administrator of the Estate of ALBERT TUCKER, Deceased

v.

A. M. BYERS COMPANY,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued November 8, 1963

Before KALODNER, STALEY and SMITH, *Circuit Judges.*

Opinion of the Court

(Filed April 8, 1964)

By KALODNER, *Circuit Judge.*

Defendant A. M. Byers Company has appealed from a judgment entered pursuant to a jury's verdict[1] in a

[1] The jury awarded $104,805 under the Wrongful Death Act and $45,000 under the Survival Act, making a total verdict of $149,805. The Death Act award was subsequently reduced to $50,000 pursuant to the order of the Court that unless the plaintiff remitted the sum in excess of that amount it would grant a new trial as to damages under the Death Act.

diversity action brought by the plaintiff, administrator of the estate of Albert Tucker, deceased, for recovery of damages under the Pennsylvania Wrongful Death[2] and Survival Acts,[3] following the District Court's denial of its motions for judgment N.O.V., or in the alternative, for a new trial.

Tucker, a 23-year old carpenter's helper, employed by Allegheny Contracting Industries, Inc. ("Allegheny"), was killed on February 3, 1959 when a trench caved in while he was assisting one May, carpenter in charge, in shoring a part of it. The trench was being excavated by Allegheny at the South Side plant of A. M. Byers Company in Pittsburgh, Pennsylvania, as part of a sewer construction project pursuant to a written contract awarded to Allegheny. As the contract, in Section 2.04 described A. M. Byers Company as "Engineer" it may hereinafter be referred to in that manner.

Since jurisdiction is based on diversity, Pennsylvania law governs.

The facts as to the accident itself are detailed in the District Court's opinion reported at 222 F. Supp. 475 (W.D. Pa. 1962). They may be summarized as follows:

The trench was to be 20 feet deep and 5 feet wide. (The record does not disclose its length). At the time of the accident about 25 feet of the trench had been shored; 8 to 10 feet remained unshored. Tucker assisted May in constructing "forms" for the shoring; each form was about 10 feet long and 5 feet wide; the "forms" were lowered into the trench one on top of the other to form a supporting frame work for the shoring planks or sheeting which were then secured along the sides of the excavation. The cave-in was due to the fact that the shoring planks were too short and the bracing was too small,[4] and as a con-

[2] 12 P.S. § 1601.

[3] 20 P.S. § 320.601.

[4] There was testimony at the trial that the sheeting was "anywhere from two to four feet" too short, and that the bracing was made

sequence the shoring twisted or shifted, throwing the "braces out of square and they collapsed."[5] Tucker "had little experience in the type of work in which he was engaged", and "His classification was that of a semi-skilled laborer."[6] The issue of his contributory negligence was left to the jury with the instruction that the plaintiff could not recover if the jury found Tucker to have been guilty of contributory negligence.

It must immediately be noted that on this appeal it is undisputed that the shoring operation was negligently performed, as the jury found it to be.

It should be added that the case was tried under the theory advanced by plaintiff's counsel that the applicable law was that found in Section 414 of the Restatement of Torts, which provides in sum that one who entrusts work to an independent contractor but retains control of any part of the work is subject to liability for the contractor's negligent performance which causes bodily harm to others.

The District Court charged the jury in accordance with this theory. It also instructed the jury that it might find the retention of control under the terms of the contract.

On this appeal the defendant urges (1) that under Pennsylvania law right of control is insufficient to establish liability in the absence of the actual exercise of control and that here there was no exercise of control; (2) that the contract did not establish right of control but the contrary; (3) that the District Court erred in not construing the contract and leaving it to the jury to do so; (4) that the issue of contributory negligence was improperly submitted to the jury, and (5) that the District Court

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up of 4 x 4 timbers rather than 4 x 6 timbers as required by the Pennsylvania Department of Labor, Rules and Regulations for Trenches and Excavations, or 6 x 6 (or even 8 x 8) timbers which were necessary because of additional conditions not considered in the Rules.

[5] Testimony of Frank W. Miller.

[6] 222 F. Supp. 477.

erred in permitting the contract to go to the jury without deletion of its provisions with respect to liability insurance.

First, as to the contention that *right of control* is insufficient to establish liability, and that *exercise of control* is essential to establish liability on the part of the employer of an independent contractor:

In Spinozzi v. E. J. Lavino and Company, 243 F. 2d 80 (1957) we said at page 82-83:

> "The Pennsylvania courts have recognized that the employer should be liable *where he has retained control of some part of the work*, or so interfered with the performance of the job as to have assumed control, and his failure to exercise that control with reasonable care causes harm to others." (emphasis added)

In essence the defendant contends that the underscored language is not a correct statement of Pennsylvania law, although he does not attack the holding in *Spinozzi* on its facts. He asserts that in *Spinozzi* and the cases cited therein, McGrath v. Pennsylvania Sugar Co., 282 Pa. 265, 127 A. 780 (1925), Stork v. Philadelphia, 199 Pa. 462, 49 A. 236 (1901), Pender v. Raggs, 178 Pa. 337, 35 A. 1135 (1896) liability was premised solely on the fact that the employer (of the independent contractor) had actually interfered with and controlled the work being performed.

In *Spinozzi* there was evidence of both actual control over the contractor's activity and of *retention of control*. The holding of the court is consistent with the conclusion that the jury was justified in basing liability on either ground or both. This is in line with the Restatement which was relied on by the District Court.

The Pennsylvania cases which antedate the Restatement (1934) provide no greater solace for the defendant's view than did *Spinozzi*. In Stork v. Philadelphia, supra,

the City of Philadelphia had engaged an independent contractor to construct a subway line below Pennsylvania Avenue. Apparently the City had retained the right to determine when shoring would be necessary to protect dwelling houses along the proposed route. It refused to authorize shoring of plaintiff's house when the excavation was first undertaken and as a result serious damage followed. The jury decided in plaintiff's favor and on appeal the defendant questioned the propriety of sending such a case to the jury. The Supreme Court affirmed the judgment predicating negligence on two factual grounds: (1) that the city had retained the right to determine when shoring should be done, and (2) that the city refused or *neglected* to authorize shoring at the plaintiff's residence. Stork manifests direct Pennsylvania support for the *Spinozzi*-Restatement view.

Furthermore, neither McGrath v. Pennsylvania Sugar Co., supra, nor Pender v. Raggs, supra, is to the contrary. In both the element of retained control was lacking, thereby leaving "assumption of control" and direction of the contractor's labor as the sole questions for the jury's determination. Defendant has not cited Pennsylvania cases to refute the Restatement view.

Assuming that the defendant retained control over Allegheny's shoring operation then the instant case is well within our holdings in Quinones v. Township of Upper Moreland, 293 F. 2d 237 (1961). There the defendant's Engineer was authorized to assure compliance, by an independent contractor, with the terms of a contract. It appeared from the evidence that an employee of the Engineer visited the job site "two or three times a week" and that he knew the day before the accident that no shoring had been done on a particular excavation, but did not order shoring. We upheld the jury's finding that the Township was liable to the estate of a worker killed when the excavation caved in.

In doing so we said at page 241:

> "What has been said makes it clear that there was ample basis for the jury's fact-finding that Township (1) had 'retained control' in the performance of McCabe's [the independent contractor] contract, and (2) was negligent in not having required McCabe to shore the trench. . . . Under the circumstances here [this] constituted negligence on the part of the Township."

In *Quinones* there was "retention of control" coupled with a failure to properly exercise that control. Here the jury found that the defendant retained control and did nothing to ascertain the condition of the shoring or to remedy any defects that it might have known of.[7]

The critical question then is whether the defendant retained "control" over the shoring operation. The only evidence presented to the jury on this point was the contract. There is no indication that the contract could not have been interpreted by looking to the meaning of its words, in their plain or popular sense, without the use of collateral or extrinsic evidence. The District Judge erred in leaving construction of the contract to the jury since it was the court's function to do so. See Easton v. Washington County Insurance Co., 391 Pa. 28, 137 A. 2d 332 (1957); Baldwin v. Magen, 279 Pa. 302, 123 A. 815 (1924); see also Wilson v. Homestead Valve Co., 217 F. 2d 792 (3 Cir. 1954), cert. den. 349 U. S. 916 (1955).

However, since in resolution of the defendant's second contention we are of the opinion that under the terms of the contract *right of control* of the shoring operation was retained by the defendant, the District Court's error is harmless.

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[7] There was testimony at the trial that two men thought to be the defendant's employees or "engineers" were present at the job site on the day of the accident. Defendant properly contends, however, that the evidence as to whether or not they were its employees depends solely upon hearsay.

Section 105 of the contract provided in part:

"The Engineer [the defendant] shall have authority *to stop the work* whenever such stoppage may be necessary to insure the proper execution of the Contract. "Re-examination of *questioned* work may be ordered by the Engineer and if so ordered the work shall be uncovered by the Contractor."

Section 301 of the contract provided in part in paragraph 9:

"The neglect, failure, or refusal of the Engineer *to order the use of bracing, sheeting, or a better quality, grade, or section, or larger sizes of steel or timber, or to order sheeting, bracing, struts, or shoring to be left in place*, or the giving or failing to give orders or directions as to the manner or methods of placing or driving sheeting, bracing, jacks, wales, rangers, or other members, shall not in any way or to any extent relieve the Contractor of his responsibility concerning the condition of excavation or of any of his obligations under the Contract. . . ."

Section 3.02 "Trench Excavation" provides in paragraph 3:

"The Contractor shall do all bracing, sheathing, and shoring necessary to perform and protect all excavations, as required for safety, *as directed by the Engineer*, or to conform to governing laws."

Section 3.03 provided in paragraphs 2 and 3:

"If *in the opinion of the Engineer*, the material used for refilling is of such character that satisfactory results cannot be obtained by tamping or ramming, the Contractor shall refill and puddle the excavation in such manner and at such times *as the Engineer may direct*.

> "If the material excavated from the cut is not clean earth, as above specified, the best of the materials excavated shall be used in backfilling, in position and manner *as directed by the Engineer*. . . ." (emphasis added)

In our opinion the emphasized provisions in the contract clearly spell out the *right of control* of the defendant over the excavation and shoring operations.

As to the defendant's contention that the issue of contributory negligence was improperly submitted to the jury:

This contention is premised on the defendant's view that Tucker was negligent in entering the excavation when he should have known that it was improperly shored, and this clearly contributed to the cause of his death; and further that if this cannot be determined as a matter of law a new trial must be granted, since the trial judge prejudiced the defendant's case when he told the jury, after charging on the issue of contributory negligence, that the evidence did not warrant a finding for the defendant on this question. The initial contention, that we must find as a matter of law that Tucker was contributorily negligent, is without merit. It is the defendant's view that Tucker had had enough "experience" to fully recognize the improper condition of the shoring and the dangers of working in an excavation so shored. The defendant did not produce a shred of evidence in support of this assertion. In fact, the evidence was that Tucker had had but little experience in the type of work he was performing when the accident occurred. The most that can be said for the defendant's position is that reasonable men might have found that a worker of Tucker's "experience" should have known that the shoring used was unsafe and that to work under such conditions was dangerous. Thus stated it was purely a question for the jury. See Dougherty v. Philadelphia National Bank, 408 Pa. 342 (1962); see also Rinard v. YBH Sales and Service Co., — F. 2d — (3 Cir.

March 16, 1964); Quinones v. Township of Upper Moreland, supra. We add that in view of the fragile nature of the evidence as to Tucker's negligence the trial judge's comment with respect to it was not of prejudicial dimension.

There remains for disposition the defendant's contention that prejudicial error was committed by the trial judge in failing to delete from the contract its provisions with respect to liability insurance before the jury retired. It is the plaintiff's view that the insurance provisions of the contract were critically relevant to the issue of the right of control.

We are of the opinion that prejudicial error was committed in failing to delete the insurance provisions from the contract before the jury was permitted to have it on retiring to consider its verdict.

The applicable rule was succinctly stated in Lenahan v. Pittston Coal Mining Co., 221 Pa. 626 (1908) at page 629:

> "The fact that the defendant in an action for personal injuries is insured in an employers' liability company has not the slightest bearing on the issue [of negligence]. It is an irrelevant fact prejudicial to the defendant and its introduction by the plaintiff . . . is ground for reversal."

To the same effect see Capozi v. Hearst Publishing Company, Inc., 371 Pa. 503 (1952) and Kaplan v. Loev, 327 Pa. 465 (1937). In *Capozi* it was pointed out that the proper method of sending a relevant document such as the instant contract (assuming it to be relevant) to the jury is to delete or block out the insurance provisions.

For the reasons stated the judgment of the District Court of October 22, 1962 will be vacated and the cause remanded with direction to have a new trial limited to the question of damages only.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,262.

HOWARD JAMISON, ADMINISTRATOR OF THE ESTATE OF ALBERT TUCKER, DECEASED,

v.

A. M. BYERS COMPANY,

Appellant.

Sur Petition for Rehearing.

Present: BIGGS, *Chief Judge*, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH, *Circuit Judges.*

The petition for rehearing filed by A. M. Byers Company, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By THE COURT,

KALODNER,
Circuit Judge.

Dated:
May 20, 1964.

tractor was essentially independent; that neither he nor his employes were servants of the owner; and that, therefore, the owner lacked the kind of control essential to its liability.

The Court, in **Miller**, cited many cases, among them **City of Erie v. Caulkins**, 85 Pa. 247 (1877), where a broad provision that "'All work to be commenced and carried on at such times, and in such places, and in such manner as the [owner's] engineers shall direct'" (85 Pa. at p. 252) was held insufficient as a basis for the owner's liability. From the whole agreement, it was clear that the owner's control was far too limited to make it responsible for the contractor's negligence. And in **Townsend v. Pittsburgh**, 383 Pa. 453 (1956), a provision that the work would be performed by the subcontractor "under the direction of" and "to the satisfaction of" the contractor was held to be a common provision in contracts for independent employment, "necessary to orderly and proper completion of the work". The Court said (383 Pa. at p. 457):

> "* * * the performance and the manner of doing so were in the subcontractor only; and Johnsons [the contractor] gave no directions in that regard. As stated in *Pennsylvania Railroad Company v. Allegheny County*, 324 Pa. 216, 219, 188 Pa. 178, these provisions are '"for the purpose of guaranteeing ultimate performance in accordance with the agreement, not to fix control over the means and manner of execution" . . . "There necessarily must be a certain control by the contractee of all undertakings . . . otherwise he could not safeguard himself as to the satisfactory accomplishment of the work"' Nothing in the contract provided that Johnsons were to control the employes of Turpin & Stewart, or the manner of performance, nor did they do so; and they cannot be held liable: * * *"

These Pennsylvania decisions conform to those in other jurisdictions. Thus, in **Gallagher v. United States Lines**

APPENDIX D.

REASONS FOR GRANTING THIS PETITION

I.

As this Court noted (Slip Opinion, page 2), since jurisdiction is based on diversity, Pennsylvania law governs. And the decisions of the Supreme Court of Pennsylvania (cited at pp. 15-16 of our Brief) hold, contrary to Section 414 of the Restatement of Torts as interpreted by this Court, that the employer of an independent contractor may not be charged with responsibility for the latter's negligence unless the employer interferes with the work or retains such control over the work as subjects him to liability under the prineiples of master and servant, which no one argues as being applicable here.[1]

Of the cases cited, we direct particular attention to the following controlling decisions of the Supreme Court of Pennsylvania considered at pp. 15-16 of our brief: **City of Erie v. Caulkins**, 85 Pa. 247 (1877), **Pennsylvania Railroad Company v. Allegheny County**, 324 Pa. 216 (1936), and **Townsend v. Pittsburgh**, 383 Pa. 453 (1956).[2]

Each of these cases concerned the precise question presented here: the liability of an owner who employs an independent contractor, for injury to or injury caused by the independent contractor or the contractor's employes. In each case, as here, the owner retained certain **rights** of

1. The conflict between Section 414 of the Restatement of Torts and the law of Pennsylvania is highlighted by the following portion of Comment (a) to Section 414:

> "* * * The employer [of an independent contractor] may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others."

2. See also **Miller v. Merritt**, 211 Pa. 127 (1907); discussed in Appellant's Brief, p. 15.

control in the contract, but the contract imposed the **obligation and responsibility** for performance in the contractor. In each case, as here, the contract between the owner and the contractor was urged as the sole basis for holding the owner liable. In each case, as here, the owner did not exercise any control. In each case, the Supreme Court of Pennsylvania held that the contract did not provide a basis for imposing liability on the owner. Nevertheless, without citation to or discussion of any of these cases, liability was imposed here.

We shall comment specifically on only one of the cases, **Pennsylvania Railroad Company v. Allegheny County**, 324 Pa. 216 (1936), since it is the only one whose actual contract provisions we did not quote in our brief.

In the **Pennsylvania Railroad** case the Railroad sought to recover damages from the County of Allegheny for damage inflicted on a water pipe owned by the Railroad, by the negligent action of an excavating contractor employed by the County. After a verdict for the Railroad, the Supreme Court affirmed the entry of judgment n.o.v. for the County. The Court was explicit in resting its decision upon the contractual provisions there involved, stating (324 Pa. at 219-220):

> "Measuring the contract before us, which we have read with care, and without setting forth its many provisions * * * (it covers 70 pages in the record) we are of the opinion, free from doubt, that the Cunningham Company [the Contractor] was an independent contractor and that, therefore, no recovery can be had from the County of Allegheny."

Because the Court did not do so, in our brief we likewise did not quote the provisions of the contract there involved. Therefore, we here do quote provisions of the contract in the **Pennsylvania Railroad** case, which in view of the Supreme Court decision in the case, make it crystal